79-903

No.

Supreme Court, U. S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1979

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**MICHAEL POSNER,**

*Petitioner,*

vs.

**UNITED STATES OF AMERICA,**

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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1. Where the government seeks handwriting samples from a probationer, and, as the sole factual basis for its motion for a court order directing him to furnish same, either intentionally or with reckless disregard for the truth, misrepresents to the court that it has no known samples of his writing, when in fact it possesses numerous known samples—including the probationer's handwritten probation reports—the exemplars thus compelled may not properly be used against the probationer as the basis for a finding that he committed criminal contempt of court ..... 8

A. Where a person's handwriting exemplars are sought by the government, not in the grand jury setting, but in an effort to determine whether he may have violated his federal probation by allegedly participating in gambling offenses in violation of state law, the principles of *United States* v. *Mara,* 410 U.S. 19, incorporating those of *United States* v. *Dionisio,* 410 U.S. 1, should be held inapplicable; and, absent the grand jury considerations therein held determinative, this

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Court should require that the government make some preliminary showing as to the necessity and/or reasonableness for a court order compelling handwriting exemplars ..... 8

B. Where, in fact, the government in its motion for an order directing a probationer to give handwriting exemplars, purports to show necessity for such order, and states, as its only factual basis therefor, that it has no known samples of his handwriting, and this is demonstrably false, as outlined above, the exemplars thus compelled should be suppressed on the probationer's timely motion ..... 8

C. Even if neither the Fourth Amendment's prohibition of unreasonable search and seizure nor the Fifth Amendment's privilege against self-incrimination precludes judicial compulsion of handwriting exemplars to be used strictly for identification purposes, due process of law must condemn the imposition of sanctions against a person on the basis of a court order entered in reliance on intentionally or recklessly false material contained in the government's motion ..... 9

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2. Where petitioner was held in criminal contempt for allegedly having attempted to disguise his handwriting in samples compelled under court order; such order was obtained by the government's intentional or reckless misstatement that it possessed no known samples of his handwriting; and without such factual misrepresentation, the court order would have been without foundation: the government's conduct renders the situation functionally equivalent to entrapment, such that this Court should deem it unconscionable to punish petitioner for his allegedly contumacious conduct which occurred only in response to the government's pretense that it lacked exemplars, which in fact it had .. 14



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## NO.

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**MICHAEL POSNER,**

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

---

Petitioner, Michael Posner, respectfully prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit, to review its decision affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, that he committed criminal contempt by intentionally disguising his handwriting in giving exemplars to the Federal Bureau of Investigation pursuant to court order.

## Judgment and Order Below

On September 12, 1979, the Court of Appeals for the Seventh Circuit affirmed the judgment below, No. 78-2543. A copy of that Court's written Order, unpublished per Circuit Rule 35, is attached as Appendix A. Petitioner's timely petition for rehearing was denied on November 15, 1979. (App. B).

## Jurisdiction of this Court

The judgment sought to be reviewed (the Court of Appeals' denial of the petition for rehearing) was entered on November 15, 1979. This petition for Writ of Certiorari is filed within 30 days from said denial. Jurisdiction of this Court is invoked under Title 28, U.S. Code, sec. 1254(1) and Rule 22.2 of the Rules of this Court.

## QUESTIONS PRESENTED FOR REVIEW

1. Where the government seeks handwriting samples from a probationer, and, as the sole factual basis for its motion for a court order directing him to furnish same, either intentionally or with reckless disregard for the truth, misrepresents to the court that it has no known samples of his writing, when in fact it possesses numerous known samples—including the probationer's handwritten probation reports—may the exemplars thus compelled properly be used against the probationer as the basis for a finding that he committed criminal contempt of court?

   A. Where a person's handwriting exemplars are sought by the government, not in the grand jury setting, but in an effort to determine whether he may have violated his federal probation by allegedly participating in gambling offenses in violation of state law,



   (i) do the principles of *United States* v. *Mara*, 410 U.S. 19, incorporating those of *United States* v. *Dioniso*, 410 U.S. 1, apply; or,

   (ii) absent the grand jury considerations therein held determinative, should this Court require that the government make some preliminary showing as to the necessity and/or reasonableness for a court order compelling handwriting exemplars?

   B. Where, in fact, the government in its motion for an order directing a probationer to give handwriting exemplars, purports to show necessity for such order, and states, as its only factual basis therefor, that it has no known samples of his handwriting, and this is demonstrably either intentionally or recklessly false, as outlined above, what, if any, redress is available to the probationer?

   C. Even if neither the Fourth Amendment's prohibition of unreasonable search and seizure nor the Fifth Amendment's privilege against self-incrimination precludes judicial compulsion of handwriting exemplars to be used strictly for identification purposes, does due process of law condone the imposition of sanctions against a person on the basis of a court order entered in reliance on intentionally or recklessly false material contained in the government's motion?

   D. Should the philosophy underlying *Franks* v. *Delaware*, 438 U.S. 154, extend to the above situation, requiring the suppression of evidence obtained pursuant to a court order procured by presentation of false information to the court in such circumstances?

2. Where petitioner was held in criminal contempt for allegedly having attempted to disguise his handwriting in samples compelled under court order; such order was obtained by the government's intentional or reckless misstatement that it possessed no known samples of his handwriting; and without such factual misrepresentation, the court order would have been without foundation: does the government's conduct render the situation functionally equivalent to entrapment, such that this Court should deem it unconscionable to punish petitioner for his allegedly contumacious conduct which occurred only in response to the government's pretense that it lacked exemplars which in fact it had?

## Statement of the Case

Petitioner, Michael Posner, was charged with violation of probation due to alleged involvement in illegal State gambling activities. Pursuant to court order entered upon the government's request,[1] he furnished handwriting exemplars. Petitioner's motion to suppress the exemplars[2] was denied; and, after hearing, the court, concluding that petitioner had committed criminal contempt by intentionally attempting to disguise his handwriting, sentenced him to 3 years extended probation with the condition that the first 6 months be served in a work-release custodial program.[3]

The Court of Appeals affirmed from the bench after oral argument in an unpublished order. (App. A)

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[1] R. 1; Apps. C & D. Hereafter: "R." refers to the Record on Appeal; "Tr." (by date) to the Transcript of Proceedings consisting of 6 volumes covering 5 dates; transcripts of the 10/6/78 proceedings are referred to as #1 or #2, there being two separate transcripts of that date.

[2] R. 3.

[3] Tr. 30, 11/27/78.



## Statement of Facts

On May 30, 1978, petitioner was charged with violation of his federal probation due to his alleged involvement in illegal State gambling activities.[4] Pursuant to the government's petition on July 10, 1978—wherein the government asserted it possessed "no known samples of defendant's handwriting"[5]—the court ordered, and petitioner promptly furnished, handwriting samples on or about July 13, 1978.

The government's handwriting expert, Jack Calvert, testified that on June 28, 1978, he received questioned documents[6] and various collected known writings of petitioner, the latter consisting of copies of probation reports, an assumed business name certificate, and copies of 6 checks, all of which, variously, bore the handwriting, printing, numerals and signature of petitioner.[7] Calvert further testified that these latter items, which he received on June 28, 1978, were, in his opinion, "*some known exemplars*" of petitioner's writing.[8]

After he received the court-ordered exemplars, Calvert compared them to the various "collected writings of" petitioner, among which were those writings he received on

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[4] R. 1.

[5] App. C, par. 3.

[6] Calvert explained that questioned documents are those the author of which is unknown.

[7] Tr. 3-4, 9/26/78; Tr. 2-3, 10/6/78, #1.

[8] Tr. 15, 9/26/78. (Emphasis added.) It is of more than mere passing interest to note that among the government exhibits Calvert testified he received on June 28, 1978, was Govt. Ex. 37—exemplars which were not furnished by petitioner, and thus not yet in existence, until July 13, 1978. (!) Tr. 3, 9/26/78. At the very least, this, too, reflects the gross negligence characterizing the government's handling of the case throughout.

June 28, 1978, enumerated *supra,* and some which he received subsequently.[9] From this comparison, Calvert opined that petitioner had "attempt[ed] to disguise" his handwriting in the court-ordered exemplars.[10]

Petitioner moved to suppress the court-ordered exemplars on the basis that the predicate stated by the government in its motion for the order—*i.e.,* that as of July 10, 1978 (the date of the motion), the government possessed no known samples of petitioner's handwriting[11]—was, blatantly and demonstrably, false.[12] In response, the government contended that the known samples of petitioner's handwriting which the government possessed were "insufficient" so that there had been no misrepresentation to the court.[13] The court denied the motion to suppress.[14]

After a hearing, the court revoked petitioner's probation based upon the court's opinion that petitioner failed to comply with the order to furnish handwriting exemplars in that he "attempted to . . . and did disguise his handwriting."[15] Petitioner was sentenced to 3 years extended probation, conditioned on the first 6 months being served in a work release program.[16]

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[9] Tr. 11, 9/26/78; Tr. 2, 6, 10/6/78, #1.

[10] Tr. 11, 9/26/78.

[11] App. C, par. 3.

[12] R. 3.

[13] R. 4.

[14] Tr. 4, 11/27/78.

[15] Tr. 4, 11/27/78. Petitioner denied any intent to mislead, Tr. 19, 9/26/78, attributing the allegation of attempted disguise to nervousness and being forced to sit some distance away from the writing surface. See footnote 25, *infra,* and accompanying text.

[16] Tr. 30, 11/27/78.



## Constitutional Provision Involved

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall . . . be deprived of . . . liberty . . . without due process of law; . . ."

## REASONS FOR GRANTING THE WRIT

### 1.

**Where the government seeks handwriting samples from a probationer, and, as the sole factual basis for its motion for a court order directing him to furnish same, either intentionally or with reckless disregard for the truth, misrepresents to the court that it has no known samples of his writing, when in fact it possesses numerous known samples—including the probationer's handwritten probation reports—the exemplars thus compelled may not properly be used against the probationer as the basis for a finding that he committed criminal contempt of court.**

**A. Where a person's handwriting exemplars are sought by the government, not in the grand jury setting, but in an effort to determine whether he may have violated his federal probation by allegedly participating in gambling offenses in violation of state law, the principles of United States v. Mara, 410 U.S. 19, incorporating those of United States v. Dionisio, 410 U.S. 1, should be held inapplicable; and, absent the grand jury considerations therein held determinative, this Court should require that the government make some preliminary showing as to the necessity and/or reasonableness for a court order compelling handwriting exemplars.**

**B. Where, in fact, the government in its motion for an order directing a probationer to give handwriting exemplars, purports to show necessity for such order, and states, as its only factual basis therefor, that it has no known samples of his handwriting, and this is demonstrably false, as outlined above, the exemplars thus compelled should be suppressed on the probationer's timely motion.**



**C. Even if neither the Fourth Amendment's prohibition of unreasonable search and seizure nor the Fifth Amendment's privilege against self-incrimination precludes judicial compulsion of handwriting exemplars to be used strictly for identification purposes, due process of law must condemn the imposition of sanctions against a person on the basis of a court order entered in reliance on intentionally or recklessly false material contained in the government's motion.**

**D. The philosophy underlying Franks v. Delaware, 438 U.S. 154, should extend to the above situation, requiring the suppression of evidence obtained pursuant to a court order procured by presentation of false information to the court in such circumstances.**

The Court of Appeals concluded that the district judge's finding—that there had been no intentional misrepresentation by the government in its motion to require handwriting exemplars from petitioner—was not "clearly erroneous."[17] Further, in language implicitly admitting some degree of culpability on the part of the government, the court decided that "any negligence by the government in stating the facts to the court was [not] conduct requiring supression [*sic.*] of the exemplars."[18]

From testimony of the government's own expert witness, it is painfully clear that as of June 28, 1978, the government possessed known writings of petitioner; for it was against these very writings that the comparison was made to the compelled exemplars which formed the basis of the

[17] App. A.

[18] App. A.

court's conclusion that petitioner had attempted to disguise his handwriting in the exemplars.[19]

Yet, 12 days after the expert received these samples, the government asserted in its motion that it had no such samples.

Moreover, the government itself was the source of these known writings, which consisted of 31 monthly probation reports filled out and signed by petitioner, a four-page probation form worksheet filled out and signed by him, and 6 checks signed by him.[20]

* * *

On July 10, 1978, the government represented, in its motion to compel petitioner to furnish handwriting exemplars, that it possessed no known samples of his handwriting. This misrepresentation was material, for it was the sole and only factual basis of the requested order.[21]

The misrepresentation, in these circumstances, if not intentional, was, at the very least, made with reckless disregard for the truth.

* * *

In *United States* v. *Mara,* 410 U.S. 19 (1973), incorporating the rationale of *United States* v. *Dionisio,* 410 U.S. 1 (1973), this Court held that neither the Fourth Amendment's prohibition against unreasonable search and seizure

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[19] Tr. 12-13, 9/26/78. In the expert's opinion, these writings constituted "some known exemplars" of petitioner's writing. Tr. 15, 9/26/78, which, being in his possession on June 28, 1978, prior to the date of the government's motion, render the statement therein (that the government possesses no known samples of petitioner's handwriting) false.

[20] Also, an assumed business name certificate. All bore, variously, petitioner's handwriting, printing, numerals and signature. Tr. 3-4, 9/26/78; Tr. 2-3, 10/6/78, #1.

[21] App. C, par. 3.



nor the Fifth Amendment's privilege against self-incrimination precluded a putative defendant from being ordered to give handwriting exemplars upon request of a grand jury. In reaching this conclusion with respect to voice exemplars, a majority of this Court further found no requirement of a preliminary showing of reasonableness:

> "Neither the Constitution nor our prior cases justify any such interference with grand jury proceedings . . . Any holding that would saddle a grand jury with mini-trials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States* v. *Dionisio, supra,* at 16-17.

This aspect of *Dionisio,* discounting any need for a showing of necessity or reasonableness of the request for court-compelled exemplars, was held equally applicable to compelled handwriting samples in *Mara, supra.*

The stated rationale, as quoted above, limits those holdings to the grand jury setting insofar as the question of a preliminary showing is concerned.

Although neither the prohibition against unreasonable searches and seizures nor the privilege against self-incrimination precludes the compulsion of handwriting samples, it must be remembered that due process of law, as guaranteed in federal criminal proceedings, governs the probation revocation hearing at bar[22]—and it is due process of law, we submit, that imposes a requirement that some preliminary showing of reasonableness or necessity should be made before a person may be ordered to furnish handwriting samples.

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[22] *Mempa* v. *Rhay,* 389 U.S. 128 (1967); *cf. Morrissey* v. *Brewer,* 408 U.S. 471 (1972) (parole revocation proceedings).

Indeed, the government believed some showing was required, or why would it have made the statements it did in the motion, that it did not have known samples of the petitioner's handwriting? The district court, too, obviously believed that the government's need for court-compelled samples was pertinent, or the court would not have questioned the government concerning its need for the requested relief.[23] Once having purported to make a showing of necessity and reasonableness, which was obviously relied upon by the district court, the government may not, on being caught in its patent falsehood, beg off merely by asserting that no such showing was required.

While conceding, *arguendo,* that the Fourth Amendment may not apply, still, we submit, the rationale underlying such holdings as *Franks* v. *Delaware,* 438 U.S. 154 (1978), should govern, whereby the government may not benefit from a court order procured by the court's reliance upon material facts either intentionally or recklessly misrepresented. There, this Court held:

> "[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that . . . the allegation of perjury or reckless disregard is established . . . *by a preponderance of the evidence,* and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as its probable cause was lacking on the face of affidavit." *Id.* at 155-56. (Emphasis added.)

[23] Tr. 3-7, 7/10/78. To the extent the argument might be advanced that the government's failure to disclose its possession of certain known writings was not an overt misrepresentation, we remind: " 'The cruelest lies are often told in silence.' " *Barbee* v. *Warden,* 331 F.2d 842, 846 (4 Cir. 1964).



At bar, it is manifest that the false statement—that the government had no known samples of petitioner's handwriting in its possession as of the date it made the motion—was the sole basis for the court's order compelling the exemplars; thus, the misstatement was "material" within the meaning of the *Franks* test as framed above. And from the foregoing argument and record references, surely petitioner has established that the false statement was intentionally or recklessly made, considering that most of the known writings of petitioner, which the government's expert testified he had well before the government's motion, came from the government itself.[24]

* * *

Fifth Amendment due process of law, we submit, is compromised past tolerable limits where a probationer may be imprisoned on the basis of court-ordered exemplars, where the order itself was procured by the government's submission to the court of demonstrably false, material statements which were either intentionally or recklessly false when made.

[24] See footnote 20, *supra,* and accompanying text. Government counsel must have known petitioner had prepared probation reports as required; and, to the extent one might charitably argue counsel may not personally have had such knowledge, the government is chargeable with knowledge of the probation department. See *Giglio* v. *United States,* 405 U.S. 150, 154 (1972); *Pyle* v. *Kansas,* 317 U.S. 213 (1942); *Curran* v. *Delaware,* 259 F.2d 707, 712-13 (3 Cir. 1958); *Barbee* v. *Warden, supra* note 23 at 846.

Certiorari should be allowed so this Court may address itself to the criteria prerequisite to the ordering of handwriting exemplars in non-grand jury situations, and to the standards expected of goverment counsel in the presentation of unsworn statements designed to induce courts to act. And to the extent that no existing rule of law may directly apply, we urge the Court to fashion a rule, either in conformity with the requirements of due process of law, or pursuant to this Court's supervisory power over the lower federal courts, forbidding the imposition of sanctions upon a defendant under these circumstances.

## 2.

**Where petitioner was held in criminal contempt for allegedly having attempted to disguise his handwriting in samples compelled under court order; such order was obtained by the government's intentional or reckless misstatement that it possessed no known samples of his handwriting; and without such factual misrepresentation, the court order would have been without foundation; the government's conduct renders the situation functionally equivalent to entrapment, such that this Court should deem it unconscionable to punish petitioner for his allegedly contumacious conduct which occurred only in response to the government's pretense that it lacked exemplars which in fact it had.**

There is absolutely no indication that petitioner was "predisposed" to commit a contempt of court, particularly by way of allegedly attempting to disguise his handwriting samples given pursuant to the compulsion of the court's order. Evidence adduced at the probation revocation hearing on the issue of whether petitioner intentionally attempted to disguise his writing is set forth below as a predicate for the argument, here advanced, that petitioner



should be treated as one who was entrapped by the government, and thus, not subject to sanctions for his allegedly contumacious conduct.[25]

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[25] Calvert, the government's handwriting expert, testified that a given person's handwriting varies from time to time, the degree of difference, in turn, varying from person to person (Tr. 21, 9/26/78). He testified that between samples of a person's natural, spontaneous writing and court-ordered exemplars, he would much rather have spontaneous writings (for purposes of making comparisons). He said a person's handwriting changes to some degree over the years and *varies under the circumstances under which he writes;* for instance, sitting at a table, or standing at a telephone booth.

In connection with his opinion testimony, Calvert testified he could not tell (and did not know) whether the conditions under which the questioned documents were written were the same as those under which the court-ordered handwriting was given.

Finally, Calvert testified that speed of writing, nervousness, and proximity of the person's body to the writing surface all affect the way a person writes. (Tr. 25, 9/26/78).

Consider, in connection with the foregoing expert testimony, petitioner's statement to the court:

> "Your Honor, I cooperated in the way that I thought I was treated. And that is not the right answer. I went up there. I sat there. *They sat me at a desk a foot away from where I was writing. I was constantly goaded. And at the time of being nervous* and all that, when I left there I told Mr. Werksman [defense counse] that I did the best I possibly could do.
>
> I don't feel to this day that I actually tried to disguise my handwriting. They have more handwriting on me than they have even shown here. They have subpoenaed my records for a year already going back before all this even happened. They have more than that. It would be so foolish to disguise. And then to come into court and to stipulate that it is my handwriting—there was no attempt to disguise it. If I was sloppy I apologize for it. But I did not knowingly have intent to cause myself any more problems." Tr. 19, 9/26/78. (Emphasis added.)

Remember, although probation revocation proceedings were brought charging petitioner with alleged participation in illegal State gambling activities in violation of his federal probation, the court did not find any such participation; rather, the sole basis for the finding of probation violation and contempt of court was petitioner's asserted attempt to disguise his handwriting given pursuant to the court order.

As has been demonstrated in Point 1, *supra,* the court order compelling petitioner to supply the exemplars was founded on a false statement in the government's motion seeking the order. Thus, only because of the government's statement that it possessed no known writings of petitioner (when, in fact, it did possess such writings) did petitioner give exemplars which formed the basis for his present sentence.

Absent a showing of reasonableness or necessity as discussed in Point 1, *supra,* petitioner may as well have been entrapped in the classic sense. The government "set him up."

This is nothing less than a case of ". . . the Government . . . seeking to punish for an alleged offense which is the product of the creative activity of . . . [the government]." *Sorrells* v. *United States,* 287 U.S. 435, 451 (1932).

In *Sorrells, supra,* and again in *Sherman* v. *United States,* 356 U.S. 369 (1958), this Court recognized the defense of entrapment, precluding the imposition of criminal sanctions upon one who commits an offense due to the importuning of government agents. While this doctrine recently has been clarified and limited, in *United States* v. *Russell,* 411 U.S. 423 (1973), and *Hampton* v. *United States,* 425 U.S. 484 (1976), to cases involving defendants not otherwise "predisposed" to commit the crime in question,



we submit that petitioner, not shown to be thus "predisposed," may avail himself of the doctrinal basis of the entrapment defense to defeat the sentence to which the government's machinations and false statements to the court has subjected him. *Cf. United States* v. *Archer,* 486 F.2d 670 (2 Cir. 1973); *Olmstead* v. *United States,* 277 U.S. 438, 485 (1928) (Justice Brandeis' dissent).

Indeed, the situation here may be characterized as the functional equivalent of entrapment.[26]

Certiorari should be allowed to permit the Court to determine whether petitioner may, consistent with due process of law and the principles underlying the entrapment defense as heretofore recognized by this Court, be punished for his allegedly contumacious conduct which occurred only in response to the government's pretense that it lacked exemplars which in fact it had.

* * *

While two wrongs[27] do not, of course, make a right, the wrong perpetrated here by the government was a wrong not only against defendant, but, first and foremost, against the court. We submit it is unconscionable to let this judgment stand in these circumstances. Should this Court not feel compelled by any existing constitutional standard to disturb the judgment, we commend the alternative of tak-

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[26] This Court has, in other circumstances, fashioned and applied a "functional equivalent" standard, in dealing with certain types of searches, which, although not physically at the border, qualify as "border searches" because functionally equivalent thereto. *Almeida-Sanchez* v. *United States,* 413 U.S. 266, 272-73 (1973). There should be no difficulty applying such a concept in the entrapment context.

[27] In so stating the old saw, we do not concede petitioner's conduct in fact was contumacious, and again refer to the material in footnote 25, *supra.*

ing appropriate remedial action in this Court's supervisory role over the administration of justice in the federal court system.

## CONCLUSION

For any or all of the reasons stated above, certiorari should be allowed to review the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JULIUS LUCIUS ECHELES
MICHAEL G. CHERONIS
CAROLINE JAFFE
*Attorneys for Petitioner*

# APPENDIX

## APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
(Argued September 12, 1979)
September 12, 1979.

Before
Hon. Thomas E. Fairchild, Chief Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 78-2543 vs.

MICHAEL POSNER,

Defendant-Appellant.

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Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 71-Cr-290
Thomas R. McMillen, *Judge*.

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ORDER

The Court, having read the briefs, addressed itself to the record, heard oral argument on behalf of the appellant and appellee, and conferred at the bench, announced in open court that the judgment appealed from is AFFIRMED.

The district judge found that there had been no intentional misrepresentation by the government in its motion to require handwriting exemplars from the defendant. That finding was not clearly erroneous. We are not persuaded that any negligence by the government in stating the facts to the court was conduct requiring suppression of the exemplars. The language of the order, which required "natural and undisguised" exemplars, was not legally deficient and there was sufficient evidence to support the court's finding that the exemplars given pursuant to that order were disguised. The judgment of the district court imposing extended probation shall be AFFIRMED.

Accordingly, the Clerk of this Court is directed to enter judgment AFFIRMING the judgment appealed from.



**APPENDIX B**

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
November 15, 1979.

Before
Hon. Thomas E. Fairchild, Chief Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 78-2543 vs.

MICHAEL POSNER,

Defendant-Appellant.

---

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 71-Cr-290
Thomas R. McMillen, *Judge.*

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ORDER

Treating the "Petition for Rehearing *En Banc*" as a petition for rehearing under Rule 40, F.R.A.P., the members of the original panel having voted to DENY,

Treating the petition as a suggestion for rehearing *en banc* under Rule 35, F.R.A.P., no judge in regular active service having requested a vote thereon,

Accordingly, IT IS ORDERED that the petition for rehearing *en banc* is hereby, DENIED.

## APPENDIX C

### GOVERNMENT'S MOTION FOR A COURT ORDER DIRECTING DEFENDANT TO FURNISH HANDWRITING EXEMPLARS TO THE FEDERAL BUREAU OF INVESTIGATION

The United States of America by Thomas P. Sullivan, United States Attorney for the Northern District of Illinois, moves for an Order directing defendant to furnish handwriting exemplars to the Federal Bureau of Investigation, and in support thereof states as follows:

1. Defendant is awaiting a hearing in this Court in the above-captioned matter, being charged with violation of the terms of his probation.

2. The Federal Bureau of Investigation has in its posession several documents of identification of which is presently in question. The Government may seek to offer all or some of said documents against defendant at the time of the hearing. The Government, however, possesses no known samples of defendant's handwriting.

3. The handwriting exemplars which are being sought will be used solely for the purpose of identification.

Wherefore Petitioner Prays that this Court direct the defendant to furnish handwriting exemplars to the Federal Bureau of Investigation on July 11, 1978, at 10 A.M. *United States* v. *Dionisio,* 410 U.S. 1 (1973); *United States* v. *Mara,* 410 U.S. 19 (1973).

Respectfully submitted

Thomas P. Sullivan
United States Attorney
By: *S. Gay Hugo*
Special Attorney
U.S. Department of Justice

SGHugo:mkc
353-5267



## APPENDIX D

### UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

UNITED STATES OF AMERICA

v. NO. 71 CR 290

MICHAEL POSNER

### ORDER

This matter coming on to be heard on the motion of the United States of America by Thomas P. Sullivan, United States Attorney for the Northern District of Illinois, for an Order directing defendant to furnish handwriting exemplars to the Federal Bureau of Investigation, and the Court having considered the Government's motion finds:

1. Defendant is charged with violation of the terms of his probation.

2. The handwriting exemplars are to be used only for identification purposes.

3. The claim of privilege under the Fourth and Fifth Amendments is inapplicable.

It Is Therefore Ordered that defendant appear on July 11, 1978, at 10 A.M., in the office of the Federal Bureau of Investigation, Room 905, 219 South Dearborn Street, Chicago, Illinois, and furnish in a natural and undisguised manner those handwriting exemplars deemed necessary.

Enter:

.....

Judge Thomas R. McMillen
United States District Court

Supreme Court, U. S.
FILED
FEB 22 1980
MICHAEL RODAK, JR., CLERK

No. 79-903

# In the Supreme Court of the United States

OCTOBER TERM, 1979

---

MICHAEL POSNER, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

WADE H. MCCREE, JR.
*Solicitor General*

PHILIP B. HEYMANN
*Assistant Attorney General*
*Department of Justice*
*Washington, D.C. 20530*

# In the Supreme Court of the United States

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1-2) is reported at 607 F. 2d 1007 (Table).

## JURISDICTION

The judgment of the court of appeals was entered on September 12, 1979 (Pet. App. 1-2). A timely petition for rehearing was denied on November 15, 1979 (Pet. App. 3). The petition for a writ of certiorari was filed on December 11, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the district court erred in revoking petitioner's probation on the ground that he had intentionally attempted to disguise his handwriting when furnishing court-ordered handwriting exemplars.

## STATEMENT

1. Petitioner was convicted in the United States District Court for the Northern District of Illinois of conspiring to violate federal gambling laws, in violation of 18 U.S.C. 371, and was sentenced in 1976 to a four-year term of probation. In May 1978, after being advised by Illinois law enforcement officials that petitioner had been charged with gambling and keeping a gambling house in violation of Illinois law, the government moved in the district court for an order requiring petitioner to show cause why his probation should not be revoked. During the course of the resultant probation revocation proceedings, the government, on July 10, 1978, moved in the district court for an order directing petitioner to furnish handwriting exemplars to "be used solely for the purpose of identif[ying]" documents in the FBI's possession that might be introduced at the anticipated revocation hearing (Pet. App. 4). Paragraph 2 of the motion stated, in pertinent part, that "[t]he Government, however, possesses no known samples of [petitioner's] handwriting" (*ibid.*).

At a hearing on the motion, held that same day, the court questioned whether exemplars were necessary, noting that the government already possessed probation reports signed by petitioner (July 10, 1978 Tr. 5). The prosecutor explained that the signatures on the reports were not known to be genuine and that the government



needed samples of printing as well as signatures (*id.* at 5-6). The court then concluded that "the government is entitled to get his handwriting more than they have already" (*id.* at 8), and over petitioner's objection entered an order accordingly (*id.* at 9; Pet. App. 5).

Three days later, petitioner produced the exemplars, but in so doing attempted to disguise his normal handwriting. The government cited this defiance of the court's order as an additional ground for revocation of petitioner's probation (see Government's Petition for an Amended Order to Show Cause, filed July 21, 1978). The revocation hearing was held in late September and early October 1978. Following testimony by the government's handwriting expert, petitioner moved to suppress the exemplars on the ground that in seeking them the government knowingly had stated falsely that it possessed no known samples of petitioner's handwriting. In response, the government elicited testimony from its expert that prior to July 10 (the date of the motion for production of the exemplars) the only samples of petitioner's writing it possessed were probation reports and bank checks purporting to bear petitioner's signature (Oct. 6, 1978 I-Tr. 2-3).[1] The expert testified that these documents were insufficient for comparison purposes not only because their genuineness had not been established, but also because (1) the documents were copies rather than originals (*ibid.*), (2) disclosure of the checks had not yet been authorized by the Internal Revenue Service (*id.* at 3-4), and (3) the documents lacked needed "[h]and printing and numerals" (id. at 20). The exemplars were

[1]Although the record is unclear on this point, the government also may have possessed a document referred to as an "assumed name certificate" (Oct. 6, 1978 I-Tr. 18).

sought after the expert advised the prosecutor of the inadequacies of the documents then on hand (*id.* at 5).

Subsequently, after concluding that petitioner had in fact disguised his handwriting, the district court denied the motion to suppress the exemplars, finding that there had been no intentional misrepresentation in the government's July 10 motion for production and that "at the most there might have been some misunderstanding as to the question [asked] the expert or the status of the evidence when the order [to produce the exemplars] was entered" (Nov. 27, 1978 Tr. 4). The court added that it had not labored under any misunderstanding when it entered the order (*ibid.*).

The court then ordered petitioner's probation revoked on two grounds—his failure to obey the order to provide true handwriting exemplars and his failure to refrain from gambling, as evidenced by two state misdemeanor charges to which he had pleaded guilty (Nov. 27, 1978 Tr. 2, 12, 25). It sentenced him to a three-year term of probation on the condition that he serve six months in a work release program (*id.* at 30). The court of appeals affirmed (Pet. App. 1-2).

## ARGUMENT

1. Petitioner argues (Pet. 8-10, 12-14) that the government misrepresented crucial facts in its application for the handwriting exemplars and that for that reason his probation should not have been revoked. At bottom, petitioner claims that the government's statement in its moving papers (Pet. App. 4) that it possessed "no known samples of [petitioner's] handwriting" was intentionally misleading. However, as the district court found, that statement was not false and did not mislead.



Although the government possessed certain documents purporting to bear petitioner's signature, those documents were not "known samples" in that the government was not certain at the time that the handwriting in them was in fact petitioner's. Furthermore, the available documents were inadequate for handwriting comparison purposes. See page 3, *supra*. The prosecutor so advised the court, albeit in general terms, at the hearing held the day the motion was filed. Thus, in context, the challenged statement was not false.

Nor was it misleading. Petitioner had been provided copies of most of the documents in the government's possession. When entering its order, the court knew of the existence of these documents but concluded that the government had demonstrated a need for a fuller handwriting sample. The court's conclusion was borne out by the handwriting expert's subsequent testimony.

In any event, even if the government's representation had been false and misleading, petitioner would not be entitled to have the probation revocation order overturned. Whatever the basis for the court's order, petitioner was obligated to comply with it in good faith or to challenge it in a proper fashion. His attempted evasion of the order was contumacious even if the order was premised on a misunderstanding by the court or a misstatement by the government. See *Maness* v. *Meyers*, 419 U.S. 449, 458-459 (1975); *Walker* v. *City of Birmingham*, 388 U.S. 307, 313-315 (1967); *United States* v. *United Mine Workers*, 330 U.S. 258, 293-294 (1947). The subject of a court order must ordinarily obey that order or seek to overturn it by orderly means; violating the order is not an appropriate method of challenging its

validity or the validity of the factual premises on which the order was based.[2]

Petitioner's reliance on *Franks* v. *Delaware*, 438 U.S. 154 (1978), is misplaced. That case involved a challenge to the admissibility of evidence seized under the authority of a search warrant obtained as the result of knowingly or intentionally false statements. Wholly different considerations govern when a court order rather than a warrant is at issue.

2. Petitioner next contends (Pet. 10-12) that the district court was without power to order him to furnish the handwriting exemplars without a preliminary showing of need. Again, however, petitioner's argument is based on a false factual premise. Contrary to petitioner's assertion, the government did make a showing at the July 10 hearing that it needed handwriting exemplars, and the district court expressly found that the government had established that need (July 10, 1978 Tr. 8).

As a legal matter, petitioner cites no authority for the proposition that a preliminary showing must be made before a court can order a probationer to furnish an exemplar to be used in a probation revocation proceeding. While acknowledging that in *United States* v. *Mara*, 410 U.S. 19 (1973), this Court specifically held that no preliminary showing of reasonableness was needed to support an order compelling production of handwriting exemplars in response to a grand jury

[2]If petitioner believed the order was improper, he could have sought review by declining to execute the exemplars and being placed in contempt. Review of the contempt citation would then have been available in the court of appeals. See *United States* v. *Ryan*, 402 U.S. 530, 532-533 (1971).



subpoena, petitioner contends that the reasoning of *Mara* is confined to the grand jury context. Even if petitioner is correct that *Mara* should be thus limited (but cf. *United States* v. *Euge*, No. 78-1453, (Feb. 20, 1980), his remedy was to challenge the order directly, not to seek to subvert it by disguising his handwriting. As with orders to give testimony, the proper remedy is to challenge the order, not to dissemble in responding to it. See *United States* v. *Mandujano*, 425 U.S. 564, 577 (1976) (plurality opinion); *United States* v. *Knox*, 396 U.S. 77, 79-80 (1969); *Bryson* v. *United States*, 396 U.S. 64, 71-72 (1969); *Dennis* v. *United States*, 384 U.S. 855, 865-866 (1966).

3. Finally, petitioner argues (Pet. 14-18) that under the circumstances of this case the government's conduct created a "situation functionally equivalent to entrapment" (Pet. 14) and therefore rendered it unconscionable for the district court to revoke his probation for disguising his handwriting.

Petitioner appears to challenge the district court's factual finding that he intentionally disguised his handwriting (see Pet. 14-15 & n.25). That finding, however, was supported by the evidence and was upheld by the court of appeals (Pet. App. 2). Accordingly, it is not open to challenge here. See *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949)); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). Petitioner also premises his entrapment argument on the assertion that the government made an intentionally misleading statement to the court in its motion. This contention, too, was expressly rejected by the district court in a finding upheld by the court of appeals (Pet. App. 2).

Even if the factual premises underlying petitioner's argument were correct, his entrapment argument would still lack substance. He was not enticed into disguising

his handwriting by the importuning of federal agents. The law enforcement officers sought natural and fully representative exemplars; nothing in the record even remotely suggests that it was their purpose to lure petitioner into disguising his handwriting and subjecting himself to probation revocation on that ground. See *Hampton* v. *United States*, 425 U.S. 484 (1976); *United States* v. *Russell*, 411 U.S. 423 (1973).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

PHILIP B. HEYMANN
*Assistant Attorney General*

FEBRUARY 1980

DOJ-1980-02